



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCR NO. 4A OF 2017

FORMERLY MACHAKOS HCCR NO. 4 OF 2016

REPUBLIC.....PROSECUTOR

-VERSUS-

JACKSON KYALO NZULA.....ACCUSED

JUDGMENT

1. **Jackson Kyalo Nzula** the accused herein stands charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that the accused on the 31st day of December, 2015 at about 9:00 am at Kimeeni village, Kimeeni sub-location in Mbooni East sub-county within Makueni county murdered **Ruth Nzula Mbui**.
2. He denied the charge and the case proceeded to full hearing with the prosecution calling eight (8) witnesses. The accused gave a sworn statement of defence and called one witness.
3. The case of the prosecution is that the deceased was the accused person's mother. She had divorced and had been given land by her mother **Alice Mbui** (Pw6) for construction and farming. The accused had come home from Nairobi and had been at the home for a short while.
4. On the date of incident (31st December 2015 at 6:30 am) the deceased and the accused came to Pw6's home. The deceased prepared tea which they took. The deceased remained at Pw6's home as Pw6 went to the shamba. The deceased's home was not far from that of Pw6.
5. While at the shamba Pw6 saw the accused running to their home. He thereafter returned to Pw6's house and came out with a panga. On seeing this, Pw6 ran to a neighbor's as the deceased followed her. As she screamed at the neighbor's gate she saw the accused cutting the deceased with the panga and the deceased fell on the ground. She was about 50 metres away when she saw this. She went to the scene, and found the deceased had been cut on the head and was dead. The accused had taken off. People came following her screams. The body was taken to the mortuary while the accused was arrested with the murder weapon – a panga (EXB2).
6. In cross examination she said the accused had been home for a week after arriving from Nairobi where he lived alone. She could not tell if he had any mental problem and/or if he was on medication.
7. Pw2 **Elizabeth Nthenya Nzola** is a younger sister to the accused. It is her evidence that on 31st December 2016, 9:00 am she was in the toilet when she heard her grandmother (Pw6) screaming. She came out and saw the accused chasing the deceased with a panga. He caught up with her and cut her neck and stomach with the panga. She ran away to her uncle's screaming but her mother was already dead. The accused was standing over the body and looking at it. She identified the murder weapon – panga EXB2. She had no idea as to the cause of the murder.
8. In cross examination she confirmed that during his stay at home the accused could refuse to eat food and was not talking. He had that morning been served tea by the deceased. She said the panga (EXB2) had been in the house and she did not know how the accused had gotten it. She later admitted that the accused used to have a mental illness.
9. Pw3 **Reuben Munayo Nzioka** a neighbor heard screams on the material day. He met the accused and Pw6 when the latter asked him to take the panga the accused had as he wanted to cut her. He held the accused and snatched the panga from him. As he walked on, he saw the accused's mother (*deceased*) who had injuries near her neck and left shoulders fall down. The witness called neighbors. The assistant chief came and he gave him the panga he had gotten from the accused.
10. Pw4 **Francis Mwema Musango** heard screams and rushed to the scene. He found the deceased lying on the ground while the accused was standing next to the body. On seeing him the accused ran away but he followed him and arrested him. Other people came and the accused was tied up with ropes. The scene was near the road.

11. Pw7 **Mutua Nzioka Ngilla** is the assistant chief for Kimeeni sub- location. He confirmed having been called and given the report of the deceased's death. He went to the scene and found the accused already arrested and his mother's body was lying there. He called the police who came and took the body and the accused. He was given the murder weapon by Muthama, the accused's uncle and he handed it over to the police officers when they came.

12. The deceased's body was identified for post mortem by her brother **Titus Mutinda** Pw5. The postmortem was then conducted by **Dr. Emmanuel Loiposha** (Pw1). He found the cause of death to be severe head injuries secondary to high stroke of force by a sharp object.

13. The body had the following injuries:

- Deep cut wound about 20x4x10 centimeters around the right ear up to occipital region.
- Severe cut at base of skull.
- Visible cut wound measuring 10x5x4 centimeters around the lower region occipital.
- Injury on right ear measuring 20x4x10 centimeters an another measuring 10x5x4 centimeters.

Pw1 produced the postmortem report (EXB1).

14. Pw8 **No. 67026 CPL John Ateka** took over the investigations from **PC Stephen Onchari Force No. 64523** who had been transferred. He stated that upon receipt of the report on 31st December 2015, police officers visited the scene. The investigations revealed that the accused had exhibited a strange behavior that morning. The body was taken away together with the accused. The panga (EXB2) was handed over to the police.

15. When placed on his defence the accused gave a sworn statement and called one witness. He testified that the deceased was his mother. He could not however recall what happened until when he heard his grandmother (Pw6) testify. He said he used to be sick and just found himself at Mathare mental hospital. He had a mental problem and was still on medication he said.

16. In cross examination he said he loved his mother and so did she and they never collided. He admitted to having killed the deceased. He said he has been on medication since August 2016 and was not born with the illness.

17. Dw1 **Catherine Katunyi Muthama** was his witness. She is married to the accused's maternal uncle. She said she has known the accused since 1986 when she got married to his uncle. He had been taken to Mathare mental hospital for treatment by his uncle Reuben.

18. She testified that after the incident the accused was just standing next to the deceased's body and was quiet. They were not able to trace the treatment documents which were given to the accused. It was her evidence that the accused became unwell in 2014.

19. She confirmed that she did not witness the incident. She was only called after the fact. She said the accused lived well with the deceased.

20. The prosecution did not file any submissions after the close of the defence case.

21. Mrs. Nyaata for the accused in her written submissions states that the fact of death is not disputed. Further that the fact of the commission of the act leading to the deceased's death is also not disputed. However, her submission's that the prosecution failed to establish that the accused had malice aforethought when he committed the unlawful act.

22. Counsel has referred to **section 11** and **section 12** of the Penal Code and submits that presumption of sanity is rebuttable. She contends that the accused has demonstrated that he was incapable of knowing the nature of the act he is charged with at the time of the commission of the offence.

23. She therefore urges the court to make a special finding to the effect that although the accused person was guilty of the act or omission charged he was insane when he did the said act as provided for under section 166 (1) of the Criminal Procedure Code.

24. It is her submission and while relying on the case of **Rep –vs- H.M.M (2016) eKLR** that one cannot be found guilty of murder if malice aforethought has not been established.

25. This is now the case before court for determination.

26. The accused is facing a charge of murder contrary to section 203 of the Penal Code which defines murder as:

Murder:

“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder”

27. There are therefore three ingredients which must be established for a charge of murder to be established namely:

- i. The fact and cause of death.
- ii. The commission or omission of an act by the accused caused the death of the deceased (*actus reus*).
- iii. The act of commission or omission was accompanied by malice aforethought/ intention (*mens rea*)

28. Section 206 of the Penal Code defines malice aforethought as:

Section 206 Malice aforethought

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances –

- a) *An intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*
- b) *Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not be caused;*
- c) *An intent to commit a felony.*
- d) *An intention by the actor or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.*

Issue no. (i) The fact and cause of death

29. There is no dispute about the fact and cause of death. Pw2 (*daughter of the deceased*), Pw3 and Pw4 (*neighbors*) Pw5 (*brother of deceased*), Pw6 (*mother of deceased*) Pw7 (*area assistant chief*) all confirmed having seen the deceased's body soon after the murder. A post mortem was conducted by Pw1 Dr. Emmanuel Loiposha who highlighted the various injuries on the deceased's body and the cause of death as severe head injuries secondary to high stroke of force by a sharp object (EXB1).

Issue no. (ii) The commission or omission of an act by the accused caused the death of the deceased (*actus reus*)

30. Pw2 and Pw6 who are daughter and the mother to the deceased respectively saw the accused person cut the deceased with a panga. The accused has also admitted having killed the mother though he can't explain what exactly happened. Issue (i) and (ii) are therefore not disputed by the defence.

Issue no. (iii) The act of commission or omission was accompanied by malice aforethought/ intention (*mens rea*)

31. Pw2 testified that prior to this incident the accused had started behaving in a strange way. He would refuse to eat and even talk. Pw6 stated that the accused had come home from Nairobi where he lived alone and had been home for about one week. He was quiet that day. Pw3 also told the court that the accused was on this material day quiet as people made noise and ran after Pw6 as she screamed.

32. In his defence the accused stated that he had been unwell and was on medication when the incident took place. He could not even explain what had happened, he said.

33. His aunt (DW1) told the court that the accused fell ill in 2014 and was taken to Mathare mental hospital by his uncle Reuben. She did not witness the murder but when she arrived at the scene she found the accused standing next to the deceased's body. He was just quiet.

34. I do note from the record that after investigations and arraignment in court, the accused was taken for mental assessment. The report of 27th January 2016 showed that he was not fit to plead. The court directed that he be taken to Mathare mental hospital for treatment. It appears that this order was not executed for quite some time. An assessment report dated 14th November 2017 confirmed that the accused was by then fit to plead. Plea was then taken on 9th April 2018.

35. The issue is not what the accused's mental status is now, but what his mental status was, at the time he committed this offence. The evidence by Pw2, Pw3, Pw6, the accused and Dw1 clearly shows that the accused had not been himself a few days prior to the 31st December, 2015. It is also the evidence of Pw2, Pw3- Pw7 that the accused's conduct on the fateful day was strange especially after the killing. The defence of insanity raised has not been rebutted at all, by any evidence from the prosecution.

36. After doing the analysis of the evidence and all the occurrences, I am convinced beyond doubt that the accused was not in his right state of mind when he killed his mother.

37. Section 166 of the Criminal Procedure Code which deals with situations of this kind provides:

“166*(1) Where an act or omission is charged against a person as an offence, and it is given in evidence on the trial of that person for that offence that he was insane so as not to be responsible for his acts or omissions at the time when the act was done or the omission made, then if it appears to the court before which the person is tried

that he did the act or made the omission charged but was insane at the time he did or made it, the court shall make a special finding to the effect that the accused was guilty of the act or omission charged but was insane when he did the act or made the omission.”

38. In the instant case as was in the case of **Rep –vs- H.M.M** (*supra*) the first two ingredients of the charge of murder were proved but owing to his mental status the ingredient of malice aforethought could not be ascertained. Does it then mean he did not kill? The answer is No. Can he be convicted of manslaughter? Again the answer is No because he was not in the right state of mind to know what he was doing and/or be responsible for his actions. That is what makes such a scenario to qualify for a special finding.

39. I therefore make a special finding under section 166 (1) Criminal Procedure Code to the effect that the accused is guilty of killing his mother Ruth Nzula Mbui but was mentally ill (*insane*) at the time of the commission of the offence.

Orders accordingly.

Delivered, signed & dated this 25th day of June 2020, in open court at Makueni.

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H. I. Ong’udi

Judge